

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	No. 05-CV-329-GKF-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S EMERGENCY MOTION FOR A BRIEF EXTENSION OF
CERTAIN OF THE EXPERT WITNESS REPORT DISCLOSURE DEADLINES
SET FORTH IN THE MARCH 27, 2008 SCHEDULING ORDER [DKT #1658]**

Expedited Consideration Prior to May 15, 2008 Requested

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and respectfully moves the Court for a brief extension of certain of the expert report disclosure deadlines set forth in the March 27, 2008 Scheduling Order [DKT #1658] for the reasons set forth herein.

I. Relief Sought

The State seeks a two week extension of the May 15, 2008 expert report disclosure deadline for the following experts: Dr. Wells and Drs. Cooke / Welch.¹ Dr. Wells' report will address matters pertaining to water quality modeling for Lake Tenkiller. Drs. Cooke / Welch's report will address matters pertaining to ecological impacts of pollution and source identification for Lake Tenkiller.

¹ Drs. Cooke and Welch will be submitting a single, consolidated expert report.

The State seeks a one week extension of the May 15, 2008 expert disclosure deadline for the following experts: Dr. Engel, Dr. Harwood and Dr. Stevenson. Dr. Engel's report will address matters pertaining to source contribution and stream and river water quality modeling. Dr. Harwood's report will address matters pertaining to bacterial source identification and risks to human health. Dr. Stevenson's report will address matters pertaining to ecological impacts of pollution and source identification in streams and rivers.

Significantly, the expert reports of the other 11 retained experts the State intends to designate would be disclosed on May 15, 2008, consistent with the existing disclosure deadline in the March 27, 2008 Scheduling Order.

Provided its Motion is granted, the State would not object to the expert report disclosure deadlines set forth in the March 27, 2008 Scheduling Order [DKT #1658] for those of Defendants' experts opining on corresponding topics being extended a corresponding extension of time. In light of this fact, and the fact that the extensions requested are temporally *de minimis* in terms of the case as a whole, no other changes in the March 27, 2008 Scheduling Order would be necessitated by granting the State's Motion.

The State conferred with defense counsel, speaking to Robert George and Michael Bond. After conferring with co-counsel they stated that the Defendants object to granting this motion.

II. Basis for the Relief Sought

As set forth in pertinent part in Dr. Wells' affidavit, ¶ 4:

The computer simulation model of Tenkiller Reservoir takes from 4-7 days to run a 50 year simulation of the impacts of phosphorus from the watershed. After running the model, it takes from 2-5 days to analyze the results of each simulation. Several of the model runs were affected by 2 power outages in Portland, Oregon that caused the model runs to stop. The power outages were a result of electric power tests done by Portland General Electric, the local power company. These model simulations had to be re-started. Taking into account the

time required to run the model and to process the model results of several runs, these power outages resulted in a delay of two weeks.

Ex. 1.

As set forth in pertinent part in Dr. Welch's affidavit, ¶¶ 3-5:

3. Our [i.e., Drs. Welch and Cooke's] work on behalf of the State is dependent upon the results of certain environmental modeling which is being conducted by Dr. Scott Wells, another expert witness retained by the State. Simply put, Dr. Cooke and I cannot complete our work until such time as we have the modeling results from Dr. Wells.

4. Unfortunately, due to circumstances beyond his control, Dr. Wells' modeling work has been delayed. (See Affidavit of Scott A. Wells, Ph.D.) The delay in receiving the modeling results from Dr. Wells has necessarily delayed my work with Dr. Cooke. In particular, Dr. Cooke and I need time to review and analyze the delayed modeling results and to incorporate the results and analysis into our report.

5. Thus, at a minimum, Dr. Cooke and I will need an additional two weeks, or fourteen (14) days, to complete our report.

Ex. 2.

As set forth in pertinent part in Dr. Engel's affidavit, ¶¶ 3-4:

3. The spring is a very busy time of the academic year. In addition to the normal university expectations, I have had a significantly increased workload in (a) annual personnel evaluation (more than 50 faculty and staff requiring approximately 4 hours each), (b) departmental budget preparation, (c) completion of significant committee activities for the academic year (serve as co-chair for a portion of University accreditation report; serve as chair for School of Industrial Engineering head search), and (d) increased activities at the end of the semester (student exit interviews, student organization banquets, two graduation ceremonies, student receptions). These academic demands have taken me away from my work on the expert report. Indeed, due to my academic responsibilities this spring, my work on the expert report has been unavoidably delayed.

4. For the above-stated reasons, I will need at least an additional week, or seven (7) days to complete my report.

Ex. 3.

As set forth in pertinent part in Dr. Harwood's affidavit, ¶¶ 4-5:

3. The spring is an extremely busy time of the academic year. Writing tests, grading papers and final exams and assigning grades all converge at this time and must be completed on schedule. This spring, I have had an unusually large classroom teaching assignment, and have had major demands on my time due to graduate student exams. Furthermore, the Department of Biology is in the process of re-configuration and I have had to spend a good deal of time on administrative concerns. These academic demands have taken me away from my work on the expert report. Indeed, due to my academic responsibilities this spring, my work on the expert report has been unavoidably delayed.

4. For the above-stated reasons, I will need at least an additional week, or seven (7) days, to complete my report.

Ex. 4.

As set forth in pertinent part in Dr. Stevenson's affidavit, ¶¶ 3-4:

3. This spring has been a very busy time for me. I have major responsibilities as a Professor at Michigan State University that had to be fulfilled during the last semester. I am principal investigator on 5 major projects that have come to an end. They required reports. As Director of the Center for Water Sciences, I was part of a delegation to China to provide advice for solving problems with nutrient pollution that is causes [sic] algal blooms and human health problems. I was part of two national EPA work-groups on wetlands assessment. I was responsible for assembling a multi-investigator proposal to the National Science Foundation for a special graduate program in environmental science. Toward the end of the semester I had to complete work with my graduate students and the North American Benthological Society. My six students had to prepare annual reports and plan their summer research. The Annual Meeting of the North American Benthological Society starts May 24, for which I have had major administrative responsibilities. These academic and professional demands have taken me away from complete dedication on my work on the expert report. This report has involved extensive data analysis and synthesis, which also required results from other expert reports. Indeed, due to recent academic and professional responsibilities as well as the amount of work required to analyze critical data for this report, work on my expert report was unavoidably delayed.

4. For the above-stated reasons, I will need at least an additional week, or seven (7) days, to complete my report.

Ex. 5.

III. Legal Standard

Fed. R. Civ. P. 16(b) states that "[a] schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge." "The 'good cause' standard primarily considers the diligence of the party seeking the amendment. The party seeking an extension must show that despite due diligence it could not have reasonably met the scheduled deadlines." *Deghand v. Wal-Mart Stores, Inc.*, 904 F. Supp. 1218, 1221 (D. Kan. 1995) (citations and quotations omitted); *see also Colorado Visionary Academy v. Medtronic, Inc.*, 194 F.R.D. 684, 687 (D. Colo. 2000) ("Properly construed, 'good cause' means that scheduling deadlines cannot be met despite a party's diligent efforts. In other words, this court may 'modify the schedule on a showing of good cause if [the deadline] cannot be met despite the diligence of the party seeking the extension'" (citation omitted)).

Simply put, "rigid adherence to the . . . scheduling order is not advisable." *SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1519 (10th Cir. 1990) (citation omitted); *see also Blackboard, Inc. v. Desire2Learn, Inc.*, 2007 WL 3389968, *3 (E.D. Tex. Nov. 14, 2007) ("exercise of *sound* discretion, however, requires that a court not enforce its scheduling order deadline rigidly and without regard to underlying facts and circumstances").

IV. Argument

Since this case was filed in June 2005, the pre-trial activities in this case have been extraordinarily extensive. The docket alone is approaching 1700 entries, and includes multiple motions to dismiss, multiple motions for judgment on the pleadings, efforts to bring in third parties, multiple discovery disputes, and even a motion for preliminary injunction. In addition to the activities reflected on the docket, there has been extensive discovery conducted by both sides. The State, for example, has responded to more than 450 requests for production, more than 200

interrogatories, and more than 280 requests for admission served by Defendants. And the State has likewise conducted (and continues to conduct) its own written and deposition discovery of Defendants, as well as its own environmental sampling program. Simply put, these pretrial activities have been far-ranging and time-consuming. There can thus be absolutely no dispute whatsoever that the State has been extraordinarily diligent in preparing all aspects of its case for trial (including its expert case), and any suggestion to the contrary would be specious in the extreme.

Despite its diligent efforts in its trial preparation, however, the State has encountered difficulties in meeting the scheduled deadline for making certain of its expert disclosures on May 15, 2008. On May 15, 2008, the State anticipates being able to make expert disclosures for 11 of its expert witnesses. However, the State needs more time for six of its expert witnesses to complete their work. Such a request is reasonable. Notably, during the March 26, 2008 hearing, the Court stated that in the event there were particularized needs necessitating a modification in the scheduling order supported by an affidavit, the Court would consider such needs. *See also* DKT #1658 (providing for requests for extensions upon showing of "good cause").

Not surprisingly in an environmental case such as this one, the expert work is largely interrelated and interdependent. Due to two separate power outages in Portland, one of the State's experts, Dr. Wells, has experienced unexpected delays in completing key water quality modeling runs that will comprise part of his report. Specifically, each of the power outages required that the modeling runs be restarted. *See, supra*, Ex. 1. These delays have had, in turn, a cascading effect on the expert work of Drs. Cooke and Welch, as their expert work is dependent in part upon information derived from these water quality modeling runs. *See, supra*, Ex. 2. In

light of this fact, the State submits that it will need an additional two weeks for Dr. Wells and Drs. Cooke and Welch to complete their respective expert reports.

Similarly, a number of the State's expert witnesses are university professors. Late-April to mid-May is the end of the academic year, and a time when heavy demands are placed upon university professors' time. *See, e.g., supra*, Exs. 3-5. These academic-related demands have diverted more time and attention away from the State's case than anticipated, and interfered with the completion of three of its expert witnesses' reports. *See, e.g., supra*, Exs. 3-5. In light of this fact, the State submits that it will need an additional one week for Dr. Engel, Dr. Harwood and Dr. Stevenson to complete their respective expert reports.

Providing the relief sought by the State in this Motion would not necessitate any delay in the trial date. Provided its Motion is granted, the State has stated that it would not object to the expert report disclosure deadlines set forth in the March 27, 2008 Scheduling Order [DKT #1658] for those of Defendants' experts opining on corresponding topics being extended a corresponding extension of time. Thus, even with the extension, Defendants will still have a full three months to prepare their corresponding expert reports. Moreover, as pointed out above, these short one- and two-week extensions would truly be temporally *de minimis* in terms of the case as a whole.

Finally, it should be pointed out that the State more than a month ago already disclosed to Defendants not only the identity of each of its expert witnesses, but also their area(s) of expertise and anticipated area(s) of testimony. *See* Ex. 6 (April 1, 2008 Letter from L. Bullock to Defense Counsel). Thus, Defendants already have a tremendous head-start in preparing their expert witnesses.

In sum, Defendants, if anything, should already be well advanced in their anticipated understanding of the opinions of many of the State's experts and will not be prejudiced by a grant of additional time for those certain reports now due on May 15, 2008.

V. Conclusion

In light of the foregoing, the State's Motion should be granted.

Respectfully submitted,

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I certify that on the 13th day of May, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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